Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet

HIGH COURT (MELAKA) — PETITION NO MT1–26–5 OF 2005
LOW HOP BING J
17 AUGUST 2006

Civil Procedure — Action — Limitation period — Dispute on solicitor's bill — Petition for taxation of disputed fee — Whether petition out of time — Legal Profession Act 1976 s 126

Legal Profession — Costs — Suing for costs — Dispute on solicitor's bill — Petition for taxation of disputed fee — Whether petition out of time — Legal Profession Act 1976 s 126

The respondents, a firm of solicitors ('the solicitors') vide application by way of summons in chambers in encl 5 filed pursuant to O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980 seek an order that the petitioner's petition in encl 2 be struck out with costs. In or about the month of October 2003, the solicitors were retained by the petitioner to represent the petitioner in four civil actions. On 1 November 2003, the petitioner asked the solicitors for the total cost of the retainer for the four civil actions. The solicitors vide letter dated 2 December 2003 informed the petitioner that the legal fee for the labour court summons was RM15,000 and for the sessions court matter, the legal fee was from RM 15,000 to RM20,000. From time to time, interim bills sent by the solicitors to the petitioner had been settled by the petitioner. From 20 August 2004 to 3 November 2004, the petitioner received gross bills amounting to RM45,684.35 for the four civil actions and on 7 December 2004, the petitioner received another bill for RM1,040. The petitioner alleged having made a total payment of RM48,532.80 to the solicitors as at 9 July 2004. The petitioner vide letter dated 18 April 2005 stated that the petitioner was agreeable to a taxation of the costs as a resolution to the disputed fees. However, on 31 May 2005, the solicitors served on the petitioner a notice under s 218 of the Companies Act 1965 demanding payment of the sum of RM49,138.14 ('the disputed fee'). The petitioner vide letter dated 14 June 2005 vehemently denied the solicitors' bills and requested the solicitors to withdraw the s 218 notice. On 8 June 2005, the petitioner deposited the disputed fee with the petitioner's solicitors, Messrs Tee & Edwin, to be released only upon taxation of the disputed fee. Pursuant to s 126 of the Legal Profession Act 1976 (s 126), the petitioner filed this petition in encl 2 on 14 July 2005. Learned counsel for the respondents submitted for the solicitors that the petitioner had no reasonable cause of action as the petitioner was out of time under s 126(1) since the solicitors' bills dated 17 August 2004, 22 October 2004 and 30 November 2004 were received by the petitioner on 20 August 2004, 27 October 2004 and 7 December 2004 respectively, while this

petition was only filed on 14 July 2005. The issue for determination is whether the petitioner is barred by the limitation period to present the petition.

Held, allowing the application:

(1) The instant petition presented on 14 July 2005 was beyond the six months limitation prescribed in s 126(1), being between five weeks and five months out of time respectively. In order to maintain the petition, the petitioner should have presented the petition within the six month time frame imposed by s 126(1). A petition presented beyond this limitation period would undoubtedly arm the solicitors with an absolute defence. A petition under s 126(1) must therefore be presented timeously (see paras 21–22).

(2) Where the limitation period prescribed in a statute has set in, an action would be rendered statute barred (see para 23); *Peng Bee Sdn Bhd v Teoh Liang Teh & Ors* [2000] 4 CLJ 825, *Vun Chun Fah & Anor v Telekom Malaysia Berhad* [1997] 1 LNS 165 followed.

(3) It is abundantly clear that the petition being presented beyond the six month limitation prescribed in s 126(1) is conspicuously unmaintainable as the petitioner's cause of action against the solicitors had lapsed and extinguished, thereby disclosing no reasonable cause of action and attracting the application of O 18 r 19(1)(a) (see para 25). Given that the petition had been found to be statute barred under s 126(1), there can be no two views that the petition had been rendered 'scandalous' in the sense of being wholly unnecessary or irrelevant; or 'frivolous or vexatious' in the sense of being obviously unsustainable, within the four corners of O 18 r 19(1)(b) (see para 31). It is also a plain and obvious illustration of an abuse of the process of the court, thereby fitting the description contained in O 18 r 19(1)(d) (see para 33).

[Bahasa Malaysia summary

Responden-responden, satu firma peguambela dan peguamcara ('peguamcara tersebut') telah melalui permohonan saman dalam kamar di kandungan 5 memfailkan berikutan A 18 k 19(1)(a), (b) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 memohon satu perintah bahawa petisyen pempetisyen di kandungan 2 dibatalkan dengan kos. Pada atau lebih kurang bulan Oktober 2003, peguamcara tersebut telah dilantik oleh pempetisyen untuk mewakili pempetisyen dalam empat tindakan sivil. Pada 1 November 2003, pempetisyen telah meminta peguamcara tersebut untuk kos sepenuhnya sebagai perlantikan dalam tindakan empat tindakan sivil tersebut. Peguamcara tersebut telah melalui surat bertarikh 2 Disember 2003 memberitahu pempetisyen bahawa kos guaman untuk saman di mahkamah buruh adalah RM15,000 dan untuk mahkamah sesyen, kos guaman adalah daripada RM15,000 sehingga RM20,000. Dari masa ke semasa, bil interim telah dihantar oleh peguamcara tersebut kepada pempetisyen dan telah diselesaikan oleh pempetisyen. Dari 20 Ogos 2004 sehingga 3 November 2004, pempetisyen menerima bil kasar berjumlah RM45,684.35 untuk empat tindakan sivil tersebut dan pada 7 Disember 2004, pempetisyen menerima satu lagi bil untuk jumlah RM1,040. Pempetisyen menyatakan bahawa ia telah membuat bayaran berjumlah RM48,532.80 kepada

peguamcara tersebut setakat 9 Julai 2004. Pempetisyen telah melalui suratnya bertarikh 18 April 2005 menyatakan bahawa pempetisyen bersetuju dengan penetapan kos sebagai penyelesaian fi yang dipertikaikan itu. Akan tetapi, pada 31 Mei 2005, peguamcara-peguamcara menyerahkan ke atas pempetisyen satu notis di bawah s 218 Akta Syarikat 1965 menuntut bayaran jumlah RM49,138.14 ('fi yang dipertikaikan'). Pempetisyen melalui suratnya bertarikh 14 Jun 2005 menafikan secara tegasnya bil peguamcara tersebut dan meminta peguamcara menarikbalik notis s 218 tersebut. Pada 8 Jun 2005, pempetisyen mendepositkan fi yang dipertikaikan itu dengan peguamcara pempetisyen Tetuan Tee & Edwin, untuk dikeluarkan hanya selepas penetapan fi yang dipertikaikan itu. Menurut seksyen 126 Akta Profesyen Undang-Undang 1976 (s 126), pempetisyen memfailkan petisyen ini di kandungan (2) pada 14 Julai 2005. Peguamcara responden menghujahkan bahawa pempetisyen tiada tindakan yang munasabah oleh kerana pempetisyen adalah di luar tempoh di bawah s 126(1) oleh kerana bil peguamcara tersebut bertarikh 17 Ogos 2004, 22 Oktober 2004 dan 30 November 2004 telah diterima oleh pempetisyen pada 20 Ogos 2004, 27 Oktober 2004 dan 7 Disember 2004 masing-masing, sementara petisyen ini hanya difailkan pada 14 Julai 2005. Isu yang perlu ditentukan ialah sama ada pempetisyen dihalang oleh had masa dalam memfailkan petisyennya.

Diputuskan, membenarkan permohonan:

(1) Petisyen yang difailkan pada 14 Julai 2005 adalah melebihi had masa enam bulan seperti yang dinyatakan di s 126(1), dimana ia masing-masing di antara lima minggu dan lima bulan diluar masa. Untuk mengekalkan petisyen, pempetisyen harus memfailkan petisyen dalam jangkamasa enam bulan yang dikenakan oleh s 126(1). Sesuatu petisyen yang difailkan selepas had masa ini akan tanpa ragu-ragu membolehkan peguamcara satu pembelaan yang mutlak. Dengan itu, satu petisyen di bawah s 126(1) mesti difailkan pada masa yang tepat (lihat perenggan 21–22).

(2) Apabila had masa yang diperuntukkan di dalam sesuatu statut telah timbul, sesuatu tindakan akan menyebabkannya dihalang oleh statut (lihat perenggan 23); *Peng Bee Sdn Bhd v Teoh Liang Teh & Ors* [2000] 4 CLJ 825; *Vun Chun Fah & Anor v Telekom Malaysia Berhad* [1997] 1 LNS 165 diikut.

(3) Adalah jelas bahawa petisyen ini difailkan melebihi enam bulan had masa yang diperuntukkan di bawah s 126(1) adalah jelasnya tidak boleh berjaya oleh kerana tindakan pempetisyen terhadap peguamcara tersebut telah luput dan dipadamkan, dan dengan itu tidak menunjukkan apa-apa kausa tindakan yang munasabah dan menarik permohonan A 18 k 19(1)(a) (lihat perenggan 25). Oleh kerana petisyen didapati dihalang oleh statut di bawah s 126(1), tiada dua pendapat bahawa petisyen ini telah dijadikan 'melampau' dalam erti ia adalah langsung tidak diperlukan atau tidak relevan; atau 'remeh atau menyusahkan' dalam erti ia sememangnya tidak dapat diteruskan, dalam empat penjuru A 18 k 19(1)(b) (lihat perenggan 31). Adalah juga satu illustrasi yang biasa dan jelas akan satu penyalahgunaan proses mahkamah, dengan itu padan dengan peruntukkan yang terkandung di dalam A 18 k 19(1)(d) (lihat perenggan 33).]

Notes

For a case on suing for costs, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1548.
For cases on limitation period, see 2 *Mallal's Digest* (Consolidated Subject Index) 4th Ed, paras 130–135.

Cases referred to

Boey Ai Leng v Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 (refd)
Cybersoft Sdn Bhd v Standard Chartered Bank [2000] 1 LNS 74 (refd)
Datuk Ir Che Amran Mohd Yusoff v Yayasan Melaka & Ors [2003] MLJU 7 (refd)
Peng Bee Sdn Bhd v Teoh Liang Teh & Ors [2000] 1 MLJ 1 (folld)
Tan Sri Dato' Eric Chia Eng Hock v NKK Corporation (Japan) [2004] 7 CLJ 137 (refd)
Vun Chun Fah & Anor v Telekom Malaysia Bhd [1997] 1 LNS 165 (folld)

Legislation referred to

Companies Act 1965 s 218
Legal Profession Act 1976 s 126(1)
Limitation Act 1953 s 9
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)

William Edwin (Tee & Edwin) for the petitioner.
Tan Hwee Hwee (Teh Hong Jet with him) (Tan Kim Siong & Teh Hong Jet) for the respondent.

Low Hop Bing J:

APPLICATION

[1] The respondents, a firm of solicitors ('the solicitors') vide application by way of summons in chambers in encl 5 filed pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 seek an order that the petitioner's petition in encl 2 be struck out with costs on the ground that:

(a) it discloses no reasonable cause of action;

(b) it is scandalous, frivolous or vexatious; or

(c) (not relevant); or

(d) it is otherwise an abuse of the process of the court.

FACTUAL BACKGROUND

[2] In or about the month of October 2003, the solicitors were retained by the petitioner to represent the petitioner in four civil actions viz Melaka sessions court summonses No 52–1411 to 1413–2003 and Melaka labour court summons No 324/2003 (collectively, 'the four civil actions').

[3] The four civil actions were in connection with foreign workers from India, who had alleged inter alia breach of contract on the part of the petitioner.

A [4] On 1 November 2003, the petitioner asked the solicitors for the total cost of the retainer for the four civil actions.

[5] The solicitors vide letter dated 2 December 2003 informed the petitioner that the legal fee for the labour court summons was RM15,000 and for the sessions court
B matter, the legal fee was from RM 15,000 to RM20,000.

[6] From time to time, interim bills sent by the solicitors to the petitioner had been settled by the petitioner.

C [7] From 20 August 2004 to 3 November 2004, the petitioner received gross bills amounting to RM45,684.35 for the four civil actions.

[8] On 7 December 2004, the petitioner received another bill for RM 1,040 together with the solicitors' letter dated 30 November 2004.

D [9] The petitioner alleged having made a total payment of RM48,532.80 to the solicitors as at 9 July 2004.

[10] Vide letter dated 15 February 2005, the petitioner expressed dissatisfaction with the solicitors' bills.
E

[11] The petitioner vide letter dated 18 April 2005 stated that the petitioner was agreeable to a taxation of the costs as a resolution to the disputed fees.

F [12] However, on 31 May 2005, the solicitors served on the petitioner a notice under s 218 of the Companies Act 1965 ('the s 218 notice') demanding payment of the sum of RM49,138.14 ('the disputed fee') within 21 days thereof, failing which the solicitors would commence winding up petition against the petitioner.

[13] The petitioner vide letter dated 14 June 2005 vehemently denied the
G solicitors' bills and requested the solicitors to withdraw the s 218 notice.

[14] On 8 June 2005, the petitioner deposited the disputed fee with the solicitors Messrs Tee & Edwin, to be released only upon taxation of the disputed fee.

H [15] Pursuant to s 126 of the Legal Profession Act 1976 (s 126), the petitioner filed this petition in encl 2 on 14 July 2005.

NO REASONABLE CAUSE OF ACTION

I [16] Learned counsel Miss Tan Hwee Hwee, assisted by Mr Teh Hong Jet submitted for the solicitors that the petitioner has no reasonable cause of action as the petitioner was out of time under s 126(1) since the solicitors' bills dated 17 August 2004, 22 October 2004 and 30 November 2004 were received by the petitioner on

20 August 2004, 27 October 2004 and 7 December 2004 respectively, while this petition was only filed on 14 July 2005. The following authorities were cited:

(1) *Peng Bee Sdn Bhd v Teoh Liang Teh & Ors* [2001] 1 MLJ 1;

(2) *Vun Chun Fah & Anor v Telekom Malaysia Berhad* [1997] 1 LNS 165.

[17] Opportunity was afforded to the petitioner's learned counsel Mr William Edwin to file his written submission but he did not appear to have availed himself of that opportunity.

[18] The issue for determination by me is whether the petitioner is barred by the limitation period to present the petition. The relevant portion of s 126(1) merits reproduction as follows:

> 126(1) An order for the taxation of a bill of costs delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost to the advocate and solicitor, at any time within six months from the delivery of the bill,...

[19] As the petitioner is the party chargeable with the bill of costs or is the person liable to pay the costs to the advocates and solicitors viz. the solicitors herein, the petitioner must within six months from the delivery of the bills present a petition to obtain an order for taxation pursuant to s 126(1).

[20] In relation to the solicitors' bills, the time frame for the purposes of s 126(1) may be tabulated as follows:

	Delivery of the bill	Petition on or before
(2)	20 August 2004	20 February 2005
(3)	27 October 2004	27 April 2005
(4)	7 December 2004	7 June 2005

[21] The instant petition presented on 14 July 2005 is beyond the six months limitation prescribed in s 126(1), being between five weeks and five months out of time respectively

[22] In my view, in order to maintain the petition, the petitioner should have presented the petition within the six-month time frame imposed by s 126(1). A petition presented beyond this limitation period would undoubtedly arm the solicitors with an absolute defence. A petition under s 126(1) must therefore be presented timeously.

[23] Where the limitation period prescribed in a statute has set in, an action would be rendered statute barred, as illustrated in *Peng Bee Sdn Bhd*, where the plaintiffs action was filed more than 12 years after the cause of action arose and was statute barred pursuant to s 9 of the Limitation Act 1953. Shaik Daud Ismail JCA (as he then was), delivering judgment for the Court of Appeal, affirmed the concurrent decision of the learned registrar and judge of the High Court in striking out the action under O 18 r 19(1) on the ground that it was unmaintainable.

[24] Another illustration is to be found in *Vun Chun Fah,* where the plaintiff's statute barred action was struck out by Ian HC Chin J who heard the appeal from the decision of the learned magistrate.

[25] It is abundantly clear that the petition being presented beyond the six month limitation prescribed in s 126(1) is conspicuously unmaintainable as the cause of action against the solicitors had lapsed and extinguished, thereby disclosing no reasonable cause of action and attracting the application of O 18 r 19(1)(a) who heard the appeal from the decision of the learned magistrate.

SCANDALOUS. FRIVOLOUS OR VEXATIOUS

[26] The solicitors also relied on O 18 r 19(l)(b) in support of their submission that this time barred petition is scandalous frivolous and vexatious, referring to:

(1) *Cybersoft Sdn Bhd v Standard Chartered Bank [2000] 1 LNS 74;* [2000] 1 LNS 74

(2) *Tan Sri Dato' Eric Chia Eng Hock v NKK Corporation (Japan) [2004] 7 CLJ 137* [2004] 7 CLJ 137

(3) *Mohamed Nazri bin Abdul Aziz v Abu Samah bin Hj Wahab & Anor* (Civil Suit Melaka High Court Civil Suit No 22–143 of 2002).

[27] There was no response by the petitioner's learned counsel to the above submission.

[28] I have on several occasions explained the ambit and purview of the words 'scandalous, frivolous or vexatious' in O 18 r 19(1)(b). Scandalous means wholly unnecessary or irrelevant, while 'frivolous and vexatious' mean obviously unsustainable: see *Mohamed Nazri*, *Boey Ai Leng v Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405 and *Datuk Ir Che Amran Mohd Yusoff v Yayasan Melaka & Ors* [2003] MLJU 7.

[29] In *Cybersoft Sdn Bhd*, Sulaiman Daud JC (now J) struck out the plaintiff's action which was filed six months and seven days beyond the prescribed limitation period of six years.

[30] Where the plaintiff's defamation action was filed out of time by one year, as in *Tan Sri Dato Eric Chia Eng Hock*, Hishamudin J affirmed the learned registrar's decision in striking it out as being frivolous, vexatious and an abuse of the process of the court.

[31] Given that the petition herein has been found to be statute barred under s 126(1), there can be no two views that the petition has been rendered 'scandalous' in the sense of being wholly unnecessary or irrelevant; or 'frivolous or vexatious' in the sense of being obviously unsustainable within the four corners of O 18 r 19(1)(b).

ABUSE OF THE PROCESS OF THE COURT

[32] This is the final ground relied on by the solicitors.

[33] Notwithstanding my direction to the petitioner's learned counsel to file a written submission to assist me in the determination of the application herein, there is an absence of the submission. It needs to be observed that the petitioner had taken the initiative to present this petition and so it is natural for the learned counsel to satisfy the court of the merits thereof. However, that was not to be the case. Instead, what had been demonstrated was a lacklustre stand. This, together with the unmaintainability of the petition on the ground that it is statute barred, is in my view a plain and obvious illustration of an abuse of the process of the court, thereby fitting the description contained in O 18 r 19(1)(d).

CONCLUSION

[34] On the foregoing grounds, I hold that the solicitors had succeeded in establishing the grounds under O 18 r 19(1)(a), (b) or (d). I therefore make an order in terms of the solicitors application in encl 5.

Application allowed.

Reported by Sally Kee